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No. 99-785

IN THE

Supreme Court of the United States

VICTOR TEICHER and
VICTOR TEICHER & COMPANY, L.P.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Petitioner's Reply Brief In Further Support Of Their Writ Of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

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TABLE OF AUTHORITIES

CASES

Brown & Williamson Tobacco Corp. v. FDA, No 98-1152 8

STATUTES

15 U.S.C. § 80b-3 . . . . . *passim*

15 U.S.C. § 80b-3a 6,7

LEGISLATIVE HISTORY

H.R. Rep. No. 1046, 89th Cong., 2d Sess. (1966) . . 5,6

H.R. Rep. No. 616, 101st Cong., 2d Sess. (1990) . . . 4

S. Rep. No. 1760, 86th Cong., 2d Sess. (1960) 3

S. Rep. No. 184, 91st Cong., 2d Sess. (1970) 3,4

S. Rep. No. 337, 101st Cong., 2d Sess. (1990) 4,5

142 Cong. Rec. S7212-01 (June 27. 1996) 7

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1. The Office of the Solicitor General ("Solicitor General") concedes -- as it must -- that when Congress originally enacted Section 203 of the Investment Advisers Act of 1940 (the "Act"), it granted the SEC authority to sanction only *registered* investment advisers. In its brief, however, the Solicitor General claims that at some indefinite point thereafter, Congress

radically changed the statute and expanded the SEC's jurisdiction to include *unregistered* investment advisers. From the inception of this proceeding, the Teicher Petitioners have requested the Government to identify by date and legislative enactment when this radical expansion took place. Neither the Administrative Law Judge, the Commission, the Government brief writers nor the Court of Appeals has taken the time or been able to answer that question. This pattern persists as the Solicitor General has also refused to address this question. These failures are traceable to the inability of the government to locate any such expressed intent in the legislative history. Obviously, if Congress had intended to effect such a dramatic increase in the SEC's regulatory authority, evidence of such an intent would be contained in the Act's extensive legislative history. But despite having access to volumes of legislative history that have accompanied each amendment to the Act, at no stage in this litigation have the Respondents been able to produce a single statement evincing Congress' intent to grant the SEC regulatory jurisdiction over the thousands of investment advisers that it concedes Congress originally excluded from its jurisdiction. The Solicitor General's continued silence is powerful evidence that Congress never intended to make such a change.

2. While the SEC, the Court of Appeals and the Solicitor General have been unable to cite to any support in the Act's legislative history for their claim that Congress radically expanded the SEC's jurisdiction to include unregistered investment advisers, the Teicher Petitioners have repeatedly offered conclusive evidence of Congress' intent. Specifically, Congress made the following statements, demonstrating that throughout the history of the Act, Section 203 (e) and (f) have dealt only with registered investment advisers:

> Under the present wording of the statute, an investment adviser not exempt from registration may escape liability for fraud simply by neglecting to register, so that the Commission can only proceed against him for having failed to register. . .This change follows the pattern now existing in the Securities Act of 1933 and the Securities Exchange Act of 1934. *In both of these statutes there are securities or persons who are exempted, for reasons of policy, from registration, and thus from the regulatory jurisdiction of the Commission,* but the fraud provisions of the Securities Act and the Securities Exchange Act are nevertheless applicable to them ....

S. Rep. No. 1760, 86th Cong., 2d Sess. 7 (1960) (emphasis supplied).

> [T]he Advisers Act prohibits fraudulent practices [Section 206] and requires those subject to its provisions to register with the Commission [Section 203(b)] and to keep books and records in accordance with Commission rules [Section 204]. It also empowers the Commission to make regular inspections [Section 204] and to take *administrative remedial action against applicants for registration and registered advisers [Section 203(e) and (f)].*

S. Rep. No. 184, 91st Cong., 2d Sess. 41 (1970) (emphasis supplied).

> *[The proposed amendments] would strengthen existing disciplinary controls over registered investment advisers* by making them more comparable to the provisions of Section 15(b) of the Securities Exchange Act relating to broker-dealers in securities and to the proposed amendments to Section 9 of the Investment Company Act.

S. Rep. No. 184, 91st Cong., 2d Sess. 41-42 (1970) (emphasis supplied).

> Because the Commission lacks authority under the federal securities laws to issue cease-and-desist orders, it typically addresses ongoing securities law violations by filing a civil injunctive action in federal district court. *The Commission also has the option of proceeding administratively in cases involving misconduct by regulated entities or their associated persons. However, the Commission may not name persons who are not associated (or seeking to become associated) with a regulated entity as respondents in such proceedings.*

H.R. Rep. No. 616, 101st Cong., 2nd Sess. 26 (1990) (emphasis supplied).

> [Temporary cease and desist orders under 203(k)(3)] may be issued by the SEC only with respect to persons or entities acting as broker-dealers, investment advisers, ... or other persons or entities *which are, or are required to be,*

> *registered with the SEC or associated with such persons.*

S. Rep. No. 337, 101st Cong., 2d Sess. 3 (1990) (emphasis supplied).

Also included in the Act's legislative history are reports from the SEC itself, including the Commission's request in 1964 that Congress broaden its authority by enacting Section 203(f). In making its request, the SEC carefully limited its request for authority over those associated with *registered* investment advisers:

> Under [current] procedures ... if a person affiliated with a *registered investment adviser* violates the law, the Commission can take disciplinary action against such person only by proceeding against the adviser even if the misconduct occurred without the knowledge or approval of the adviser. . .Under the Exchange Act, the Commission has been granted the authority to take direct disciplinary action against *individuals associated with registered broker-dealers* . . .[The Commission] recommends that a new paragraph ... be added to Section 203 of the Investment Advisers Act, which would authorize the Commission to proceed directly against a person and to censure, bar, or suspend the right of such person to be *affiliated with a registered investment adviser*. .

SEC, Public Policy Implications of Investment Company Growth, H.R. Rep. No. 1046, 89th Cong., 2d Sess. 343-44 (1966) (emphasis supplied).

Furthermore, the SEC itself has implicitly acknowledged that it lacks authority over unregistered investment advisers by not bringing an administrative action against one until it brought this case in 1994, more than fifty years after Congress passed the Act, more than twenty years after Congress enacted Section 203(f), and after decades of only bringing enforcement actions against registered investment advisers.

3. While the Solicitor General acknowledges that the 1996 enactment of Section 203A retracted the SEC's jurisdiction by reassigning to the States the exclusive authority to regulate nearly two-thirds of the active investment advisers, it fails to address the fact that Congress effected this change by relieving this large class of investment advisers of their obligation to register with the SEC. Rather than contend with this critical evidence of Congress' intent that the *obligation to register* is the crucial prerequisite to the SEC's jurisdiction, the Solicitor General simply sidesteps it, claiming without authority that Section 203A applies only to the "routine" supervision of investment advisers.[1] Similarly, the Solicitor General fails to

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[1] The Solicitor General incorrectly claims that the language of Section 203A preserves the SEC's authority to sanction "any advisor." (U.S. Br. at 14). Section 203A(b)(2), to which it cites, however, merely reiterates that the statute does not preempt the *States'* authority to "investigate and bring actions." There is no mention of the SEC's retention of such authority, and indeed, such a construction is plainly inconsistent

address the Court of Appeals' judicial usurpation of Congress' stated intent to *reduce* the SEC's jurisdiction, by granting the SEC the authority to regulate and sanction the very investment advisers that Section 203A was intended to assign to the States -- those exempt from registration.

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with the statements of Congress that accompanied the 1996 amendments. *See* Statement of Sen. D'Amato, 142 Cong. Rec. S7212-01 (June 27, 1996) (amendments intended to "tighten up regulation by giving the States and the SEC distinctly separate regulatory roles").

* * *

For these and all of the foregoing reasons, Petitioners Victor Teicher and Teicher & Co. respectfully request this Court to grant their petition for a writ of certiorari. Alternatively, for the reasons stated in their petition, if the Court does not grant certiorari, the Teicher Petitioners respectfully request that the Court hold its ruling in this case without taking any action until after it decides *FDA v. Brown & Williamson Tobacco Corp.*, No. 98-1152.

Dated: February 8, 2000

Respectfully submitted,

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